

March 15, 1994

MEMORANDUM

SUBJECT: Sanctions Policy for State Title V  
Operating Permits Programs

FROM: John S. Seitz, Director /s/  
Office of Air Quality Planning and Standards (MD-10)

TO: Director, Air, Pesticides and Toxics  
Management Division, Regions I and IV  
Director, Air and Waste Management Division,  
Region II  
Director, Air, Radiation and Toxics Division,  
Region III  
Director, Air and Radiation Division,  
Region V  
Director, Air, Pesticides and Toxics Division,  
Region VI  
Director, Air and Toxics Division,  
Regions VII, VIII, IX, and X

This memorandum describes the Environmental Protection Agency's (EPA's) policy for applying sanctions when States<sup>1</sup> fail to submit required title V operating permits programs or when EPA disapproves submitted programs. It does not address EPA's sanctions policy in the event of inadequate implementation of a State program.

Summary

Under today's policy, if a State fails to submit a program by the November 15, 1993 due date or if EPA determines that a submittal is not complete, the 18-month period that must expire before EPA is required to apply mandatory sanctions would start on the date the submittal was due. If the State submitted a complete program before the 18-month period expires, the State would avoid sanctions. If the State submitted a complete program

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<sup>1</sup>In this memorandum, "State" refers to any permitting agency required to submit a part 70 permits program and includes any State agency, local agency, or U.S. territory. It does not include Indian tribes, which may implement the part 70 program if desired but are not required to do so. The EPA may cover sanctions for Indian tribes in future rulemakings establishing the criteria for treating tribes as States.

after expiration of the period, EPA would lift any sanctions already imposed for nonsubmittal. If EPA disapproves a State-submitted program, the 18-month period would begin at the date of disapproval. If the 18-month period expires without EPA taking final action to approve a subsequent submittal, EPA must impose mandatory sanctions, which would remain in place until EPA approves a subsequent submittal.

States were required to submit operating permits programs meeting the requirements of title V and part 70 regulations by November 15, 1993. If a State fails to submit such a program or EPA disapproves a program, the Act requires EPA to impose one of the sanctions specified in section 179(b) of the Act (i.e., 2-to-1 offsets or highway funding restrictions). These mandatory sanctions are required 18 months after a failure to submit unless the State submits a complete program before expiration of the 18-month period. Sanctions must also be put in place 18 months after EPA disapproves a State submittal, unless prior to expiration of the 18-month period the State submits and EPA approves a revised State program. If the State has not come into compliance within 6 months after EPA applies the first sanction, a second sanction is required.

The Act gives EPA discretionary authority to impose sanctions before the 18-month period expires. The EPA would anticipate using discretionary sanctions only in those cases where State inaction warrants their use. The Act also requires EPA to implement a Federal operating permits program by November 15, 1995 in States without approved part 70 programs.

#### Completeness Determination

Part 70 requires EPA to determine whether a program submittal is complete within 60 days of receipt. The 18-month period will only begin if the submittal is late or incomplete. To find a submittal incomplete, EPA would have to determine that the submittal failed to address all of the elements required in section 70.4(b) for complete program submittals. These items are summarized in Attachment A (Program Completeness Checklist). Examples of these include: a) evidence that the regulations comprising the program have been adopted through proper State procedures, b) a requirement to make the permit and application available to the public, and c) a fee demonstration.

A submittal that addresses each of the elements of section 70.4(b), even if it does so inadequately, may still be found to be complete. A submittal that fails to address each of the elements, however, cannot be found complete.

### Sanctions for Failure to Submit

Where EPA finds that a State has failed to submit any program or has submitted an incomplete one, the 18-month period for mandatory sanctions would start automatically from the November 15, 1993 due date. It would stop if the State submitted a complete program before the 18-month period expired (i.e., May 15, 1995). If a submittal is received just prior to the expiration of the 18-month period, and EPA has not determined whether it is complete by that date, the Agency would not impose sanctions unless it determines in the subsequent 60-day period that the submittal is incomplete.

If a State submitted a complete program after the expiration of the 18-month period, EPA would discontinue any action to impose sanctions and would lift any sanctions already imposed. The Act provides that if EPA imposes mandatory sanctions, they must remain in place until the Agency determines the State has come into compliance. Once a State's submittal has been found to be complete, the State would be in compliance with the requirement to submit a complete program. The EPA's approval of the program is not necessary to stop sanctions in these cases.

### Effect of Interim Approvals on Sanctions

The EPA may grant interim approval for up to 2 years to States whose programs "substantially meet" the requirements of part 70, but are not fully approvable. Title V provides that during the interim approval period, EPA's authority to impose sanctions and the duty to promulgate a Federal permits program for the State are suspended.

Once EPA has granted interim approval to a program, the State is required to submit a corrective program for full approval 6 months before the end of the interim approval period. If the State fails to submit a complete program for full approval by that date, EPA would start an 18-month mandatory sanctions clock at that time. While part 70 does not clearly provide that the sanctions period would start for a failure to submit a corrective program, EPA intends to propose to revise the part 70 rule in the future to clarify the linkage between the starting of the clock and this required submittal. If the 18-month period expires without State submittal of a complete program requesting full approval, EPA would impose mandatory sanctions at that time.

If, after granting a State interim approval, EPA subsequently disapproves a State's corrective program, EPA would begin an 18-month mandatory sanctions period in conjunction with the final disapproval. EPA would not impose sanctions if the

State submits and EPA fully approves a corrective program before that 18-month period expires. If, however, the 18-month period expires before final EPA approval, EPA would impose a mandatory sanction at 18 months. This sanction would remain in place until EPA takes final action to approve the subsequent submittal.<sup>2</sup>

Regions should consider taking measures to expedite review of corrective submittals for interim programs to avoid both the unnecessary application of sanctions and implementation of a Federal permit program. One way to expedite review is for Regions to work closely with States as they develop their corrective programs so that quick action may be taken to propose approval once a program is submitted. Another way is for the Regions to process the proposed action in parallel with the State's final adoption of its program, if the Region has received a draft version of the corrective program and is confident that the program will not change in any significant way before final State action.

In very limited circumstances, Regions could consider coupling a notice proposing or granting interim approval with a proposal to approve the State's anticipated corrective submittal. This approach should be used only in cases where the corrective action is quite specific, such as deletion of an unapprovable program element or establishment of a simple, precisely-specified program element. The proposals would set forth the express corrections necessary for full approval. Approval or disapproval of the corrective submittal would depend on whether the State's corrective submittal matched the corrections identified in the notice. Under this approach, the public would have an opportunity to comment on the anticipated corrections during the interim approval process. This would allow Regions to proceed directly to final approval following receipt of the State submittal, provided the corrective submittal substantively complies with the corrections specified in the earlier notice. If a State's corrective submittal fails to match the anticipated corrections and is otherwise unacceptable, the Region could

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<sup>2</sup>The approach described here (i.e., that EPA must fully approve a program before the 18-month clock expires in order to avoid imposing sanctions, or that it must fully approve a program in order to lift sanctions that were imposed) is consistent with EPA's proposed sanctions policy under title I [see the proposed rulemaking selecting the order in which sanctions would be imposed under title I (58 FR 51270, October 1, 1993)]. Any changes that EPA makes to that policy in its final rulemaking on title I will be reflected in the forthcoming national rulemaking for title V sanctions described elsewhere in this policy.

proceed directly to final disapproval and start an 18-month mandatory sanctions period from the date of disapproval. If the submittal was acceptable, but was not what was identified in the proposal, the Region could proceed to propose approval of the submittal. If the State failed to submit anything at all, the 18-month period would start at the due date for the corrective submittal.

### Sanctions for Program Disapproval

If EPA disapproves a State's title V program, the 18-month period for mandatory sanctions would start at the date of final disapproval. Sanctions would be imposed 18 months after final disapproval of a State program, unless EPA has approved a program prior to expiration of the 18-month period. Sanctions would remain in place until EPA fully approves a subsequent submittal.<sup>3</sup> However, unlike title I, where EPA must fully approve a program to lift sanctions, under title V, interim approval of a program can also lift sanctions.

As indicated above, granting interim approval suspends EPA's duty to impose sanctions and to promulgate a Federal program for the State during the interim approval period. If EPA grants interim approval before expiration of the 18-month period, no sanctions would be imposed and the 18-month sanctions period is no longer applicable. If the 18-month period had expired and sanctions were imposed, EPA's grant of interim approval would lift the sanctions. As described above, if a State then failed to submit a corrective program within 18 months after the interim approval, the Agency would start an 18-month period for mandatory sanctions. In addition, if EPA disapproved a submitted corrective program, it would start an 18-month period for mandatory sanctions on the date of disapproval. Failure to approve a full program by the end of the interim approval would also trigger EPA's duty to impose the Federal permits program.

### Partial Approvals

While the Act suspends EPA's authority to impose sanctions during an interim approval period, no such suspension occurs where State programs receive partial approval. Under part 70, partial programs are geographically-limited programs that cover only part of a State. Where a State program consists of an aggregate of partial programs, and one or more of the partial programs fails to be submitted or approved, EPA would apply sanctions only in those areas that failed (or for which the State

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<sup>3</sup>Footnote 2 is also applicable here.

failed) to submit an approvable program or in areas that submitted programs that EPA disapproved. This would not prevent EPA from imposing sanctions in appropriate circumstances on the entire State where all partial programs in a State are inadequate due to a common failure (e.g., inadequate legislation).

### National Rulemaking

As part of the implementation of this policy, EPA intends to propose a national rule in late summer 1994 and promulgate it before May 15, 1995. This rule would implement the provisions outlined in this policy. It would also select the order in which sanctions would apply, provide for automatic imposition of sanctions where warranted according to the deadlines under the Act, and indicate which States had failed to submit complete programs as of the time of the notice. Sanctions would be promulgated at part 52, similar to the approach taken in the proposed rulemaking for title I sanctions. The rule would describe the process by which EPA would consult with the Secretary of the Department of Transportation prior to imposing the highway sanction.

The national rule would select the first sanction to apply as required by section 179(a) of the Act. In States with designated nonattainment areas, EPA intends to propose that the offset sanction would apply first. In States without designated nonattainment areas, the highway sanction would be the only sanction available and would apply at the end of the 18-month period. [Under title V, EPA may apply the offset sanction only in designated nonattainment areas.] The proposed national rule would provide for the imposition of only one mandatory sanction at the expiration of the 18-month period. If the deficiency has not been corrected within 6 months thereafter, the proposal would provide that the second sanction would be imposed as required by section 179(a), except in States with no designated nonattainment areas where the offset sanction cannot be imposed.

A chronological description of the process by which sanctions would be imposed is contained in Attachment B. Also, flow charts which lay out the process for submittals, approvals and disapprovals, and interim approval actions are provided in Attachment C.

I trust that this guidance will be useful. If you have any questions, please contact Ray Vogel or Rich Damberg, Permits Programs Branch, at (919) 541-3153 and (919) 541-5592, respectively, or Mike Thrift, Office of General Counsel, at (202) 260-7709.

## 3 Attachments

**OPERATING PERMITS PROGRAM COMPLETENESS CHECKLIST**

December 15, 1993

The attached operating permits program completeness checklist is a tool for determining if a program submitted by a permitting authority is complete enough to warrant review by EPA for either full, partial, or interim approval. Section 70.4(a) of EPA's Part 70 regulations requires the submittal of operating permits programs, and section 70.4(b) stipulates what a program must contain. Section 70.4(e)(1) provides 60 days for EPA to determine if the program submittal is complete enough to warrant review by EPA for approval. If EPA finds a program submission complete, the 1-year period for EPA review of the submission shall be deemed to have begun on the date of receipt of the submission. The EPA may find that a program submittal is incomplete, in which case the 1-year period for program review does not begin until all the necessary information is received by EPA. Moreover, if EPA finds a submission to be incomplete, the 18-month mandatory sanctions clock established in section 70.10(a) will have started as of the required submittal date for failure to submit a complete program.

This checklist is only for use in determining if the program submittal is complete enough to warrant EPA review and for allowing processing of the submittal to proceed. The review for program submittal completeness is not intended to address the approvability of the program or any program element. Judgment as to the adequacy of any program element must still be made during the succeeding determination of program approvability.

The program should be reviewed for completeness to ascertain whether there is sufficient information available for each program element to be able to determine whether the element is approvable or not. In those instances when a program element clearly should be in a regulatory provision, a determination of program submittal incompleteness is warranted if any such element is not regulatory or provided for in underlying statutes that can be directly implemented by the permitting authority. Finally, if any element is not addressed at all in the program submittal, the program would be incomplete with respect to that element.

The attached checklist restructures the section 70.4(b) requirements for program content into a more usable format by grouping similar program elements such as relevant program documentation or enforcement provisions. The organization of this checklist follows the organization of the larger program review checklist which was made available on August 5, 1993.



December 15, 1993

# OPERATING PERMITS PROGRAM COMPLETENESS CHECKLIST

*Yes/No*                      *Comments/Action Required*

PROGRAM SUBMITTAL ELEMENTS. Does the operating permits program address the following elements? NOTE: This checklist is appropriate for application to a local agency permitting program covering the area of jurisdiction of the local agency. In such case, the term "State" should be read to mean the local government or permitting agency, as appropriate.

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I.     A letter from the Governor, or his or her designee, requesting EPA approval of the program. [70.4(b)] NOTE: For a local program, the Governor could designate a local government official as having authority to submit the local program to EPA for approval.

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II.    A program description describing how the permitting authority intends to carry out its responsibilities under the Part 70 regulations. [70.4(b)(1)]

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III.   The permitting regulations and available evidence of their procedurally complete and correct adoption; copies of all relevant enabling legislation or regulations including those governing administrative procedures that either authorize the Part 70 program or restrict its implementation; and any criteria used to determine insignificant activities or emissions levels. [70.4(b)(2)] NOTE: Criteria may be nonregulatory but activities or levels must be specified by regulation.

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IV.    The Attorney General's legal opinion that addresses each of the following required program aspects: [70.4(b)(3)]

A.     Issue permits that include all applicable requirements and the requirements of the Part 70 regulations and assure compliance with all those requirements. [70.4(b)(3)(i) and (v)]

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- B. Incorporate monitoring, recordkeeping, reporting, and compliance certification requirements into permits. [70.4(b)(3)(ii)]
- C. Issue permits for a fixed term. [70.4(b)(3)(iii) and (iv)]
- D. Terminate, modify, or revoke and reissue permits for cause. [70.4(b)(3)(vi)]
- E. Enforce permits, permit fee requirements, and the requirement to obtain a permit. [70.4(b)(3)(vii)]
- F. Make permit, permit application, compliance plan, and monitoring and compliance certification information available to the public. [70.4(b)(3)(viii)]
- G. Not issue a permit if EPA objects. [70.4(b)(3)(ix)]
- H. Provisions for opportunity for judicial review in State court of final permit actions.
- I. The authority of the permitting authority is not used to modify the acid rain program requirements. [70.4(b)(3)(xiii)]

V. Relevant program documentation including the following:

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- A. Copies of permit forms, application forms, and reporting forms to be used in the operating permits program. [70.4(b)(4)(i)]

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B. Any relevant guidance to assist in implementing the program.  
[70.4(b)(4)(ii)]

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C. A showing that addresses the adequacy of personnel and  
funding to administer the program. [70.4(b)(8)]

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D. A transition plan for issuing the initial permits during the  
first 3 years after program approval. [70.4(b)(11)]

VI. Provisions contained in **regulations** for implementing the operating  
permits program, including the following: NOTE: These provisions  
could be in underlying statutes if the statutes can be directly  
enforced by the permitting authority.

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A. Provisions for continuing permits or permit terms if a  
timely and complete application is submitted, but action is  
not taken on renewal prior to permit expiration.  
[70.4(b)(10)]

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B. Provisions for action on permit applications. [70.4(b)(6)]

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C. Provisions for permit content including all applicable  
requirements, a fixed term, monitoring and related  
recordkeeping and reporting requirements, and source  
compliance requirements. [70.4(b)(16)]

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D. Operational flexibility provisions. [70.4(b)(12)]

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E. Provisions for permit issuance, renewals, reopenings, and  
revisions, including public, EPA, and affected State review  
to be accomplished in an expeditious manner. [70.4(b)(13)  
and (16)]

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F. If the permitting authority allows off-permit changes, provisions assuring compliance with sections 70.4(b)(14) and (15). [70.4(b)(14) and (15)]

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VII. A demonstration that required permit fees are sufficient to cover the cost of the permit program. [70.4(b)(7)]

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VIII. Enforcement provisions, including the following:

A. A complete description of the compliance tracking and enforcement program including criteria for monitoring source compliance. [70.4(b)(4)(ii) and (5)]

B. A commitment to submit enforcement information annually to EPA. [70.4(b)(9)]

C. **Regulatory** provisions for enforcement authority covering the program enforcement elements in section 70.11. [70.4(b)(3)(vii)]

IX. Provisions to implement applicable requirements from portions of the Act other than Title V. [70.4(b)(3)(i) and (v)]

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A. Provisions (which could include a commitment for future action) implementing the Acid Rain requirements of Title IV of the Act.

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B. Provisions (which could include a commitment for future action) to assure compliance with all existing and future applicable requirements of section 112 of the Act.

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C. Provisions (which could include a commitment for future action) to implement the enhanced monitoring requirements of section 114(a)(3) [and section 504(b)] of the Act.

## **Attachment B**

### **Process for Imposing Sanctions**

The process by which sanctions would be imposed for nonsubmittals (including incomplete submittals) and disapprovals is described below.

Completeness of submittals should be determined by EPA's Regional Offices within 60 days of receipt. If a submittal is found to be complete, the Region should notify the State of that finding and that the 1-year EPA processing period has begun. If a submittal is found to be incomplete, the Region should send a letter to the State notifying it that the submittal is not complete and identifying the elements the State needs to submit to make the submittal complete. In addition, the incompleteness letter should make the following points:

- The 18-month mandatory sanctions period began on November 15, 1993, but will stop when EPA receives a submittal that it finds to be complete.
- EPA intends to propose mandatory sanctions for States without complete programs in its national rulemaking projected for late summer 1994. If a complete submittal is received before publication in the Federal Register of that proposal, EPA would not propose sanctions for that State.
- A complete submittal is needed early to minimize the chance of EPA implementing a Federal program in November 1995. If a complete submittal is still not received by EPA by May 15, 1995, the Agency would impose mandatory sanctions as provided for in the final national rule. Before publishing the final rule, EPA would take public comment into consideration.

By late summer of 1994, EPA would propose the national rule, selecting the order in which mandatory sanctions would be applied; identifying the States to which sanctions would apply if no complete submittal is received by May 15, 1995; and proposing how EPA intends to decide other related issues. By May 15, 1995, EPA would promulgate the national rule, and on that date the selected sanction would apply automatically where warranted. By November 15, 1995, a second mandatory sanction would apply automatically in the subject areas as provided for in the national rule if the State had still failed to submit a complete program. In addition, Regional Offices must promulgate, implement, and enforce a Federal operating permits program by this date in areas where EPA has not approved a program. For

interim approvals, sanctions for nonsubmittal would apply automatically as provided for in the national rule in any State that failed to submit a complete corrective program within 18 months after the due date for the corrective program.

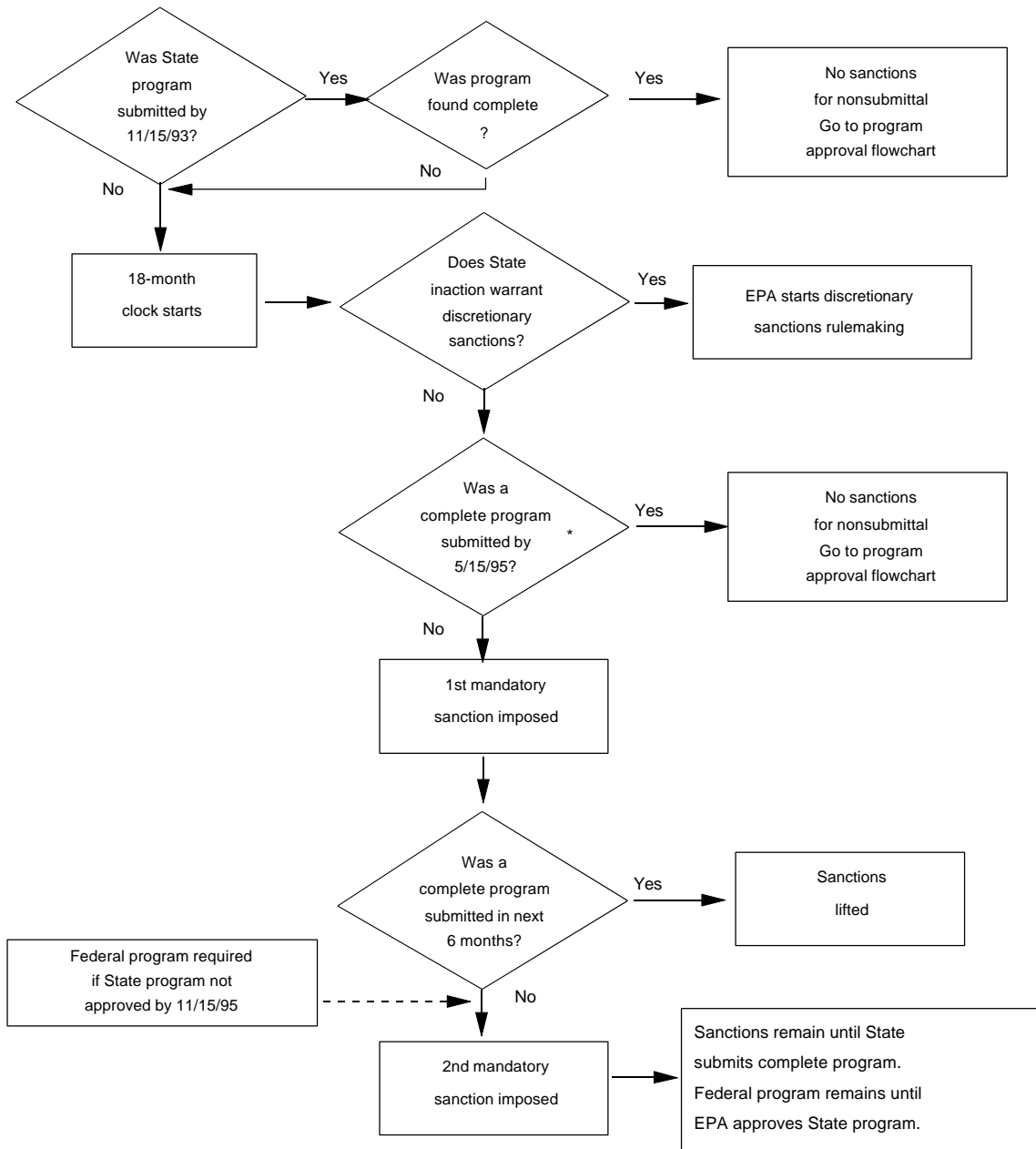
In cases of program disapproval, Regions should notify States that the 18-month mandatory sanction period started on the date of disapproval. This notification could occur in the final notice promulgating disapproval of the program. At the end of the 18-month period, if EPA has not approved a subsequent State submittal, EPA would impose mandatory sanctions as provided for in the national rule. Alternatively, Regions could provide for a different order of sanctions in the proposal and final notices disapproving the State program.

Attachment C

Sanctions Flowcharts

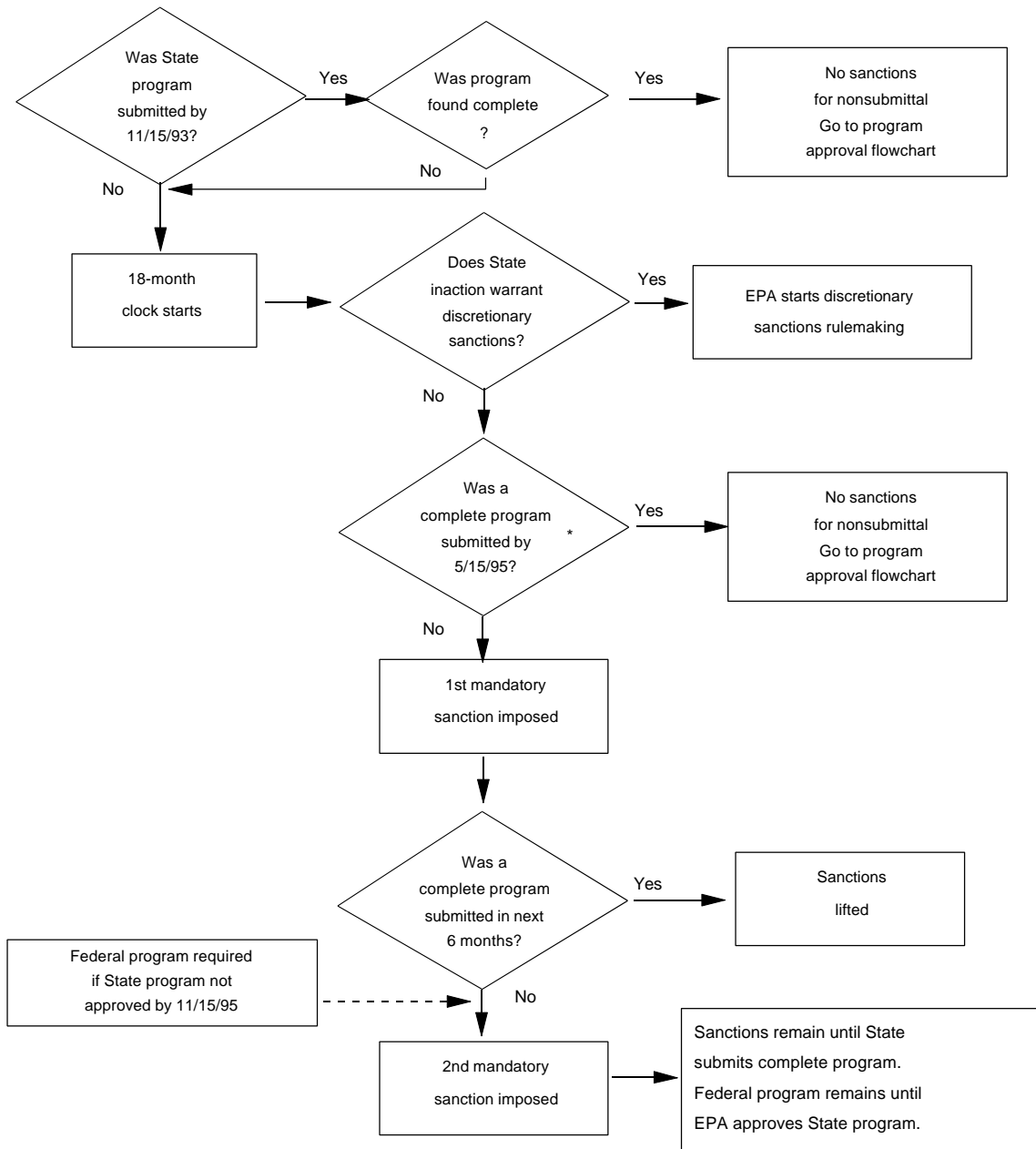


Attachment C  
Title V Sanctions Flowchart No. 1  
PROGRAM SUBMITTAL



\* If submittal is received just before 5/15/95, EPA will use the 60-day period to determine completeness of the submittal. If the submittal is found to be incomplete EPA would impose sanctions.

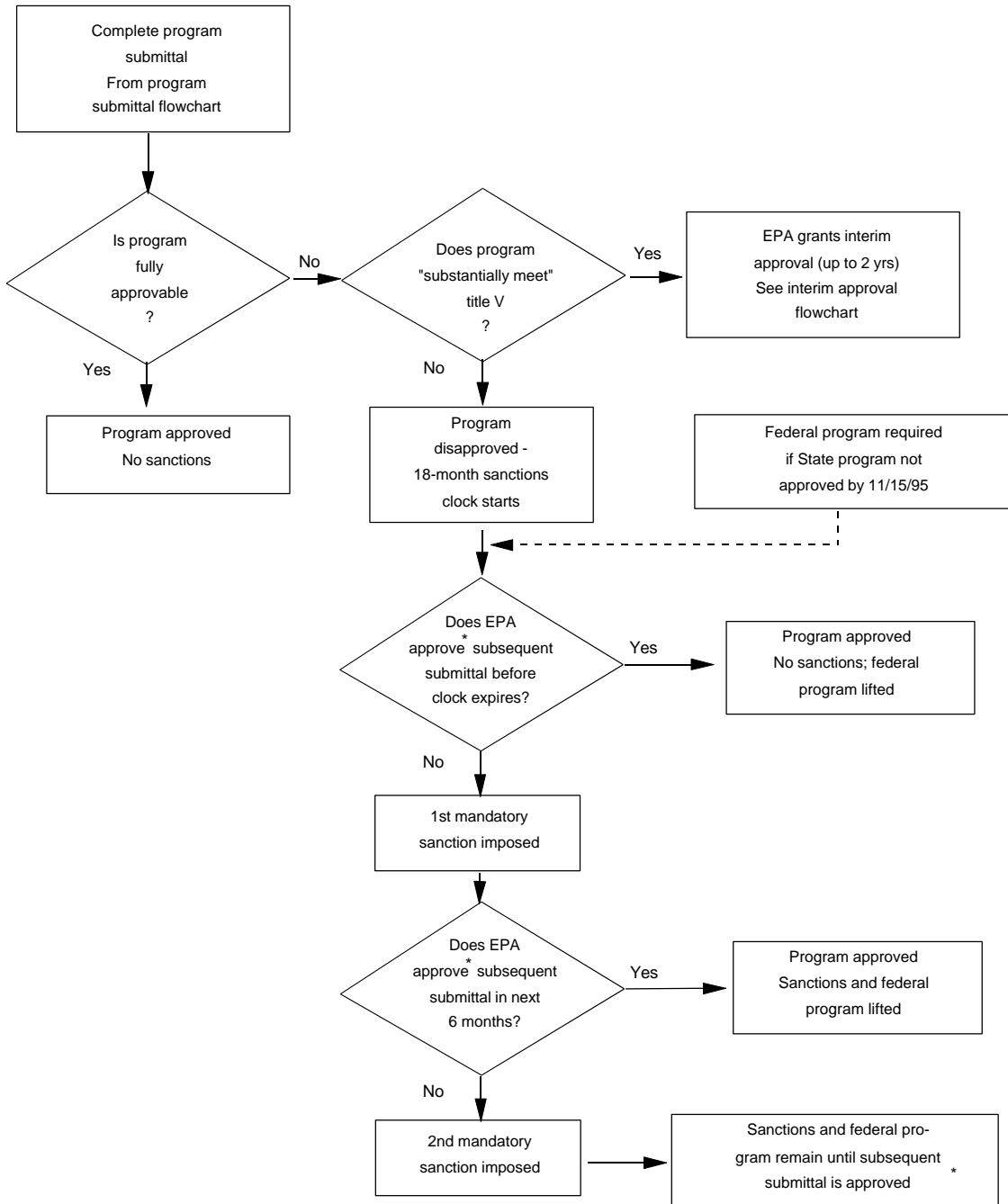
Attachment C  
Title V Sanctions Flowchart No. 1  
PROGRAM SUBMITTAL



\* If submittal is received just before 5/15/95, EPA will use the 60-day period to determine completeness of the submittal. If the submittal is found to be incomplete EPA would impose sanctions.

## Title V Sanctions Flowchart No. 2

### PROGRAM APPROVAL



\* Either full or interim approval is sufficient to avoid the imposition of sanctions or the federal program, or to lift them once imposed.